Central Law Journal

St. Louis, November 20, 1923

MODERNIZING THE RULES OF EVIDENCE

There is a growing demand in this country, both lay and professional, that there shall be produced "all the facts before the court and jury," wherein is presented a serious scientific problem, but one not impossible of practical solution. The venerable laws of incompetency are gradually but surely falling away under the axe of advancement and an awakening to the desirability of a greater certainty in the administration of justice. The text writer, Dean John H. Wigmore, may be looked upon as the pioneer accepted text authority on the subject. He has probably done more to restate the law of evidence than any other man. He did it not so much by argument as by an arbitrary ipse dixit that has been complacently accepted by receptive courts. (1 Wigmore Evidence, Sec. 578.)

It fell to the lot of another able law dean and text writer, Judge Martin P. Burks, of the Supreme Court of Appeals of Virginia, both to write and to apply the statute releasing the limitation of incompetency in Virginia. As one of the Codifiers of the Virginia Code of 1919, he prepared the statute; as judge he interpreted it and gave it life, instead of hobbling it. (Epes v. Hardaway, 28 Va. Appeals [Feb., 1923], S. E. Ark.). His opinion supplies one of the most illuminating histories extant of the effort of the legislative department, under the direct guidance of presiding judges and practicing lawyers, "to permit the production of all evidence bearing upon the question at issue," just as in "the business affairs of life it is received and considered by the business world." "It seems proper," said Judge Burks, "that the same rule should obtain in courts of justice which are enforcing rights arising out of such transactions." Said he, "the purpose of the revisors was to remove disqualifications, not to create them in any case, nor to impose burdens on witnesses already competent."

A few years ago the spirit of advancement in Virginia was such as to cause the Legislature to erect a commission to revise the Code. It was happily composed of experienced men instead of the average legislator. It "undertook to make material changes in the law governing the competency of witnesses to testify, so as to remove practically all disqualifications and permit the courts to hear all evidence bearing on the question at issue just as is usual in the business affairs of life." Conviction for felony now merely affects the credit of the witness, but does not disqualify him. Legatees and devisees are competent to testify without suffering forfeiture. The competency of husband and wife as witnesses was materially enlarged, excepting uncorroborated testimony in divorce cases.

The first application of this meritorious legislative effort at a sensible judicial search for the truth arose out of the denial by counsel of the right of the survivor of a transaction to testify. The learned advocate seemed unable to grasp such a solecism. It presented an excellent opportunity for interpretation by the author of the Act, a law teacher, a practical lawyer, a text writer on practice and procedure, who was the judge. The opinion recites that "in order to meet the difficulties that may arise in consequence of a removal of disqualifications, the revisors have added a new section declaring: In an action or suit by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executrix, administrator, heir, or other representative of the person so incapable of testifying no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony; and in any such action or suit, if such adverse party testi-

fies, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence."

The reason for the statute as furnished gives both a human and an economic appeal. Said the Court, "it was believed that this section, together with the great safeguard of cross-examination, would be ample protection for the estates of persons laboring under disability or who are incapable of testifying." Then comes the forceful and prophetic words set down in the first lines hereof and which we respectfully but earnestly commend to the profession. "In the business affairs of life all evidence bearing upon the question at issue is received and considered by the business world, and it seemed proper that the same rule should obtain in courts of justice which are enforcing rights arising out of such business transactions."

We shall never reach the extent of unlimit in vogue in the French courts nor is such an opera bouffe necessary in order to achieve the end desired. It is a meritorious custom of the common law, that at the trial of a case a statement of the facts of the cause of action, from which the alleged legal liability can be drawn, must be presented upon a permanent mandatory record. Anything beyond is *corum non judice* and void. So all irrevelant evidence must be excluded. The doctrine of *res adjudicata* and the protection afforded by due process of law are in this way preserved, which imports the participation of the State as the third party as well as the finality of the litigation.

But, while the evidence is confined to the issues created by the record, the limit upon it should be gauged by the common sense view of the business world. This is the principle settled by the Virginia law and which is worthy of emulation. It is within these broad limitations that the obligation was created and was breached. Courts are more and more coming down to the level of laymen in the mechanics of the law. It originated under James I, that hater of mystery, when he abolished all Latin from the courts and, for that matter, from the Church. While pleading, as now practiced, is a mystery yet unsolved by the lawyer and to which judges are still devoting fifty per cent of their time, the rules of evidence are proving a close rival. But the pleadings are never seen by the layman while the application of the rules of evidence occur in his presence. The incompetency of a reputable citizen as a witness, known to the community as possessing first-hand knowledge, is popularly ascribed "to the smartness of the successful counsel"; it is attributed by counsel to sacred principles and inexorable laws many centuries old. Now it appeals very strongly that the layman thought out his reason and the lawyer absorbed his; that both are justified in their respective positions, but that both view the situation in error. The lawyer simply called antiquity to his aid. He might as well have snatched a leaf from the "Blue Laws" of the sixteenth century immured a law-abiding man of today—and such an improbability with measurable frequency happens. The latter would have been futile under the condemnation of a righteously indignant public opinion, because the layman's education had advanced beyond the spell of witchcraft. The former stands in all its pristine glory because the lawyer's education has not advanced to the faculty of adducing the whole truth. There is no one else to do it. And that is the point. Shall we predict, without too serious an objection, that some Greenleaf, Jr., will within the fullness of time rewrite the Senior's great epic, saving the immutable canons, but refining the other in the cauldron of twentieth century juridicial improvement? Unless we greatly err, the conservative Old Dominion has made a splendid start.

THOMAS W. SHELTON.

Norfolk, Va.

NOTES OF IMPORTANT DECISIONS

THEFT OF FUR COAT FROM PORCH NOT COVERED BY INSURANCE POLICY.—It is held by the Court of Appeals of Maryland, in Fidelity & Deposit Co. v. Panitz, 120 Atl. 713, that no recovery can be had for the theft of a fur coat, stolen from a porch, under a policy of insurance covering theft from the interior of insured's apartment. That the porch had no exterior entrance, was held to be immaterial. We quote from the opinion of Adkins, J., as follows:

"It seems to us that the reason for the express restriction of the risk incurred by the policy to goods contained in the interior of the apartment is obvious, and that the word 'interior' should be given a common sense meaning. The mere fact that no exterior entrance to the porch is provided has no bearing, when the purpose of the restriction is considered. If it did, then a porch of the same character on the first floor should be considered as the interior of the first floor apartment.

"In the latter case a thief could more easily step over the rail; but it is a matter of no serious difficulty to climb up to the second floor or to reach up with a pole. It is just such a risk that the terms of the policy excludes.

"The only case cited by either side that seems to be in point is Driver et al. v. State, 18 Ala. App. 261, 89 South. 897, cited by appelant. This was an indictment for theft of seed corn under section 7324 of the Code of 1907: Any person who commits larceny from or in any dwelling house, storehouse, smokehouse, etc., on conviction must be imprisoned in the penitentiary not less than three nor more than six years.

"The law as it stood prior to that time omitted the word 'from.' In the case cited the Court referred to the earlier case of Henry v. State, 39 Ala. 680, in which it was held that the taking of goods from the banister or rail of the porch attached to the dwelling house would not come under the earlier statute, and that such taking was not a taking 'in' the dwelling house The word 'from' was incorporated in the later act to meet the decision in the Henry Case. The Court added:

"'Our undertanding, however, of the holding in the Henry Case, is that the Court merely held that, while the porch may, in some sense, be a part of the house, it was not under section 3170, *in* the dwelling house, in such a sense as that a felonious taking therefrom would constitute a taking *in* the dwelling house. A taking *from* the dwelling house is very different from taking *in* the dwelling house.'

"Chase v. Hamilton Ins. Co., 20 N. Y. 52, cited by appellee, merely decides that the words 'dwelling house' are to be construed as including the kitchen, although the subject of the risk is described in the application as a stone dwelling house, and the kitchen attached is a wooden kitchen."

DIFFERENCE BETWEEN VALUE OF SECURITIES RECEIVED ON REORGANIZATION AND STOCKHOLDER'S INVESTMENT HELD TAXABLE INCOME.—It is held by the Supreme Court of the United States, in Cullinan v. Walker, 43 Sup. Ct. 495, that upon reorganization of a corporation and the exchange of securities, the difference between the value of the securities received by a stockholder and the amount of his investment, constitutes taxable income. In part the Court say:

"Cullinan insists that his gain so ascertained was merely an incident of a reorganization. This was equally true in the Phellis and the Rockefeller Cases. It is sought to differentiate those cases on the ground that there the distributed stock of the new corporation was technically a dividend paid out of surplus, and that here the segregation is not of that character. But the gain, which when segregated becomes legally income subject to the tax, may be segregated by a dividend in liquidation, as well as by the ordinary dividend. If the trustees in liquidation had sold all the assets for $6,000,000 in cash, and had distributed all of that, no one would question that the late stockholders of Farmers' Petroleum Company would, in the aggregate, have received a gain of $5,900,000, taxable as income. The result would obviously have been the same, if the trustees had taken in payment, and distributed, bonds of the value of $6,000,000, in some new corporations. And the result must also be the same where that taken in payment is $3,000,000 of such bonds and $3,000,000 in stock of a third corporation. All the material elements which differentiate the Phellis and Rockefeller Cases from Eisner v. Macomber are present also here. The corporation, whose stock the trustees distributed, was a holding company. In this respect, it differed from Farmers' Petroleum Company,

which was a producing and pipe line company. It differed from the latter, also, because it was organized under the laws of another state. It is true that, at the time this Delaware corporation's stock was distributed, it held the stock of the new oil-producing company and likewise the stock of the new pipe line company. But the Delaware corporation was a holding company. It was free, at any time, to sell the whole, or any part, of the stock in either of the new Texas companies and to invest the proceeds otherwise. By such a sale, and change of investments, all interest of the holding company in the original enterprise might be parted with, without in any way affecting the rights of its own stockholders. When the trustees in liquidation distributed the securities in the three new corporations, Cullinan, in a legal sense, realized his gain, and became taxable on it as income for the year 1916."

CONSTRUCTION OF STATUTE REQUIRING MACHINERY TO BE GUARDED.—The statute regarding the protection of employees using machines was intended to cover all appliances, machines, and machinery in manufacturing plants, and to extend its protection to all persons employed in such establishments, whether working at and with the machines or about them, and a machine is "dangerous" in such sense that the employer is required to guard it, if, in the ordinary course of human affairs, danger may be reasonably anticipated from the use of it without protection. To "guard" a dangerous machine within the meaning of the statute is to provide it with a guard, that is, any device, fixture, or attachment designed to protect or secure against injury from it. To "guard" a stamping press within the meaning of the statute, held to impose the duty to provide a device to warn the operator that the upper die is descending and to push his hand from under it, if he does not remove it himself in time. The statute leaves it primarily to the master to determine whether a machine needs guarding or fencing, and, if so the means and the manner of complying therewith, subject to the duty, which is absolute, to exercise all ordinary care with respect to the matter, and if there is a safety device known and in general use which will prevent injury to employees, a master in failing to guard his machine with such device fails to exercise ordinary care. Simon v. St. Louis Brass Mfg. Co. (Mo. Sup.), 250 S. W. 74.

HAS A COURT OF EQUITY POWER TO ENJOIN PARADING BY THE KU KLUX KLAN IN MASK?

By
Chas. B. Griffith,
Attorney General of Kansas.
Donald W. Stewart,
Assistant Attorney General.

The question propounded above, in view of the recent riots and disturbances in Ohio, Pennsylvania, New Jersey and Oklahoma, is a timely one. The remedy suggested is novel and so far as we can ascertain has been raised for the first time in Kansas. It may serve to provide a legal, orderly method of disposing of a situation and practice that is fraught with grave danger to the peace and dignity of any State.

The Attorney General of Kansas has ruled that public parades by masked members of the Ku Klux Klan are a disturbance of the peace. That ruling has been followed in portions of Kansas. It is a disputed question and has never been ruled upon by any court.

The Klan of Fort Scott, Bourbon County, Kansas, recently advertised a public parade in mask to take place in the City of Fort Scott on the evening of October 6th, 1923. The attention of the Attorney General was called to this proposed parade and on October 5th, 1923, a petition and application for an injunction was filed in the District Court of Bourbon County, Kansas, in the name of the State on the relation of the Attorney General and County Attorney.

The petition named the State as party plantiff and Thomas Daly, John Doe and Richard Roe as defendants. Mr. Daly is alleged to be the leader of the Fort Scott Klan and the only member definitely known to the State. The petition alleged in substance, among other things that the defendants, and many others unknown to the State, would, unless enjoined by the

court, parade in public in the mask of the Ku Klux Klan in Bourbon County, and elsewhere in Kansas. It further alleged that such a parade would seriously disturb the peace and quiet of the citizens of Kansas, would disturb the public order and tranquillity, would incite others to riot and disorder and would cause a great and irreparable injury to the lives, property and peace of the State of Kansas and the inhabitants thereof. It was further alleged that such parade, by reason of those facts would be a public nuisance and that the State was without adequate remedy at law. A temporary injunction was asked, which the State prayed might be made permanent and perpetual on final hearing, enjoining the defendants and all other persons from parading in public in the mask of the Ku Klux Klan in Kansas.

Prior to the time set by the court for a hearing upon the application an agreement was reached between the attorneys for the parties, by the terms of which agreement the proposed parade was called off, and the hearing extended to permit a briefing of the legal question involved. In the meanwhile a conference of the leading Klansmen of Kansas has been called to consider the question of forbidding the public use of the mask in Kansas. Upon the outcome of that conference, further action in the case depends.

The legal questions suggested by this proposed use of the injunctive remedy will, we think, be of interest to the bar in general. Those questions we will discuss as fully as time and space will permit.

As indicated in the introduction to this article the State views the actions of all persons parading in public in the mask of the Klu Klux Klan as a disturbance of the peace and a common nuisance and therefore subject to injunction at the suit of the proper State officers. In determining the correctness of that view, several questions logically present themselves for consideration. They are:

1. IS A PARADE IN PUBLIC BY MASKED MEMBERS OF THE KU KLUX KLAN A DISTURBANCE OF THE PEACE?

Since the State does not contend that every masked parade under every circumstance would be a disturbance of the peace and a public nuisance, we limit our inquiry to the above question.

The present Knights of the Ku Klux Klan claim in numerous documents published by them to be the regeneration, reincarnation, and the logical and legal successor of an organization of the same name that flourished in the Southern States immediately after the Civil War. We can assume that the present organization succeeded not only to the mystic phraseology, the awe-inspiring ritual and dress, but also to the reputation of its predecessor. Since they have adopted the name, the plan of organization, the ritual, the paraphernalia, and many of the purposes of the old organization, they may be presumed to have done so intentionally and with full knowledge of the reputation and character of the old order. It is interesting to note that reputation.

> "KU KLUX. A secret society organized in many of the Southern States after the Civil War, whose object was apparently to prevent negroes or northerners from gaining ascendancy in the South. The organization warned, expelled, whipped or murdered persons obnoxious to it, and long over-awed the negroes, but was finally broken up by the United States military forces in 1871, after the passage of the enforcement act, which was popularly known as the Ku Klux Act."—Funk & Wagnalls' New Standard Dictionary.

See also: Webster's New International Dict. Century Dictionary and Cyclopedia. New Intern. Encyclop., Vol. 13, 383. Messages and Papers of the Presidents, Vol. 7, 132-134, 139, 150. Federal Cases, 14893, 15790. 16 Statutes at Large, 140.

As evidence of the admitted connection of this present order with the old order discussed above, we wish to quote these few lines from the charter of the Kansas City Klan introduced in evidence as Exhibit No. 19 in the ouster suit now pending in the Supreme Court of Kansas, wherein the date of granting of the charter is expressed in this manner:

"On this the twenty-third day of the twelfth month of the year of our Lord, nineteen hundred and twenty-two, and on the desperate day of the wonderful week of the horrible month of the year of the Klan, *fifty-six*, and in the eighth cycle of the third reign of our reincarnation."

Having given that historical background, we pass to a consideration of the question as to whether or not a masked parade by members of this organization is a disturbance or breach of the peace. In so doing we wish to first give a few general definitions.

"In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquillity, by any act or conduct inciting to violence or tending to provoke or incite others to break the peace.

"By peace as used in the law in this connection is meant the tranquillity enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society. It is, so to speak, that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted.

"Nor is actual personal violence an essential element of the offense. If it were, communities might be kept in a constant state of turmoil, fear and anticipated danger, without the commission of the offense."

"The term 'breach of the peace' is generic, and includes going around in public without lawful occasion in such manner as to alarm the public."

Vol. 8, Ruling Case Law, 305-306.
Vol. 8, Corpus Juris, 386 *et seq.*
Words and Phrases, 2d ed., Vol. 1, 493.
Bishop, Criminal Law, 7th ed. 541.
Section 2659, Gen. Stat. Kan., 1915.

From the few general citations above it will be evident that any act or conduct which is either a disturbance of the public order in itself, or which induces or leads others to create such a disorder, is a breach of the peace. The same may be said of any act that alarms the public or incites fear or anticipated danger.

The general rule just stated has been applied in a great many cases, and we will discuss some of them and cite others as follows:

People v. Burman, 154 Mich. 150, 25 L. R. A., n. s., 251:

The case of The People v. Burman is very applicable to the case at bar. In a little town in Michigan in 1908 a socialist organization decided to parade, carrying red flags. They did so, conducting themselves in an otherwise peaceful manner. The sight of the flags infuriated the public, who started a riot. The paraders were charged with disturbing the peace by conduct inciting others to disorder. The defendants contended that they had a right to carry a red flag, and that it was not an improper flag in their minds, but merely a symbol of brotherhood and fraternity. The Court, in affirming the conviction, said:

"There is no right to display a red flag in a procession when those composing the procession know that the natural and inevitable consequence will be to disturb the public peace and tranquillity in violation of a statute or ordinance." (Syl. 6.)

"Upon trial of an information for carrying a red flag in a parade and thereby infuriating the public in violation of an ordinance against riot, evidence is ad-

missible as to how such flag was regarded by the public." (Syl. 3.)

"The question here is not whether the defendants have in general a right to parade with a red flag. It is this: Have they such a right when they knew that the natural and inevitable consequence was to create riot and disorder. * * * They knew that it would excite fears and apprehension and that by displaying it they would provoke violence and disorder. Their right to display a red flag was subordinate to the rights of the public." (Page 256.)

By reading again the above quotations and substituting the word mask for the words red flag, the applicability of the citations will be evident.

Commonwealth v. Haines, 4 Clark (Pa.), 17:

This is an early Pennsylvania case where the defendant, an innkeeper in an Irish community, hung up on St. Patrick's day, a "paddy" or effigy of St. Patrick. This infuriated the public and a riot followed, which the defendant was charged with inciting. On account of a technical error in the indictment the defendant was discharged, but the Court said:

"No man has the right to trifle with the feelings of any large class of men so as to provoke them to a breach of the peace. * * * The gist of the offense is its tendency to provoke a breach of the peace. It may be indiscreet in the Irish residents in the district to take notice of acts of this kind, but it is worse than indiscreet in others to provoke them to do so."

In a footnote to this case it is said:

"It is a curious fact that in one of the earliest riot cases on record, the overt act was the same as in the present case. In 1740 London was thrown into an uproar, on St. Patrick's day, by a collision between two rival processions, one bearing a 'paddy' and the other a 'shelah'."

Pennsylvania v. Norris, Addison, 274:

This is probably the earliest American case involving the question of inciting others to disorder. The defendant was indicted in 1794 for raising a standard or pole (unfriendly to the established government), "to the great disturbance of the peace." The Court said:

"Pole raising was a notorious symptom of dissatisfaction, and the exhibition of this in the only part of this country where the government was supposed to have strength must have made an impression very unfavorable to the whole country, promoted violence in the people here, and induced force on the part of the government."

Commonwealth v. Daley, 2 Clark (Pa), 151:

This case was decided in 1844. A lively political issue, which incidentally involved a religious question, was stirring the community. One of the political meetings was broken up by a disorderly mob. The parties meeting thereupon adjourned and later called another meeting in a settlement unfriendly to the proposals they were advocating. To this second meeting they marched *en masse* with banners and weapons, and seemingly challenged interference. The interference duly came, and as a result a riot and murder ensued. The Court in its discussion of the case dwelt upon the legality of a lawful assembly to consider a political question, and deplored and condemned the mob that broke up the first meeting. In considering the second meeting, however, out of which grew the riot, the Court said:

"But a public meeting, otherwise legal, may from the manner, place and circumstances of its organization, become an unlawful and even a riotous assembly. * * * If the meeting so summoned and assembled adjourned to march in a body to a place principally inhabited by citizens notoriously opposed to its objects, openly exhibiting arms and displaying banners containing inscriptions

lacerating to the feelings of such citizens, the assembly sunk from its dignified position of a body of free men, exercising a great constitutional right, into a mere riot."

For further cases treating the question of what constitutes a disturbance of the public tranquillity, see the following:

Commonwealth v. Karvonen, 219 Mass. 30; 106 N. E. 556, L. R. A. 1915 B, 706.

The Insurance Company v. The Tobacco Company, 116 S. W. 234. (Armed and masked night riders held to constitute mob and riot.)

Tandy v. City of Hopkinsville, 160 Ky. 220; 169 S. W. 703. (Night rider case.)

Deek v. Commonwealth, 178 S. W. 1129; L. R. A. 1916 B, 1117.

Commonwealth v. Frishman, 126 N. E. 838; 9 A. L. R. 549.

Oklahoma v. Darneal, 174 Pac. 290; 1 A. L. R. 638.

Commonwealth v. Oakes, 113 Mass. 8. (Holding state need only show one person disturbed.)

Cartwell v. Rochester, 8 N. Y. State 291.

Burk v. Commonwealth, 19 Pa. 412.

People v. Most, 171 N. Y. 423; 58 L. R. A. 509.

The plaintiff feels that these cases cited above will clearly indicate that any act by any person or persons which is either violent, or menacing in itself, or which induces others to violence, or which disturbs or tends to disturb the public tranquillity or order, is a breach of the peace or a disturbance of the peace whether or not the anticipated violence occurs. As Mr. Bishop has said, "The community is disturbed whenever it is alarmed." The plaintiff claims that the community, or a considerable portion thereof, is alarmed by these masked parades. The defendants cannot avail themselves of the fact that in general the communities have thus far held their heads and have not let their alarm incite them to actual disorder. How long that portion of the community who are proscribed and antagonized by this organization may be able to restrain and control themselves is a serious question. The fact that they have in general thus far done so does not show or tend to show that they have not been disturbed.

Having in this brief manner disposed of the first question, we will now pass to a consideration of the second, which is:

2. IS SUCH A PARADE A COMMON OR PUBLIC NUISANCE?

In considering this question we will necessarily have to deal somewhat with the third question, which deals with the right of a court of equity to enjoin such a nuisance. We will endeavor, however, to confine ourselves to a discussion of whether or not an act which disturbs the peace and violates and tends to violate the public order and tranquillity, is a common or public nuisance. In considering that question it would be well first to give a few general definitions:

"A nuisance is anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights."

Cooley on Torts, 565.

3 Blackstone Commentaries.

N. Y. Penal Code, 385.

Syl. 1, The State v. Rabinowitz, 85 Kan. 841.

We can perhaps best illustrate what acts have been held to be common or public nuisances by citing and discussing a few cases.

The State, ex rel., v. Lindsay, 85 Kan. 79.

This was an action brought by the Attorney General, in which an injunction was granted, enjoining the defendants from keeping a private insane asylum, one of the chief contentions being that the keeping of such asylum is a public nuisance, because the noise of the inmates and their frequent escapes caused "fear and consternation to the public, disturbing the peace and quiet thereof." The Court, in

holding the injunction properly granted, said:

"Where a statute prohibiting the establishment of asylums or retreats for the care of the insane or persons of unsound mind for compensation and hire, without first obtaining a license from the State Board of Charities, is continuously violated by receiving, keeping, maintaining and caring for persons of the classes named in an unlicensed asylum or retreat, *thereby causing fear, consternation and disturbance of the peace in the community*, an injunction will properly be granted to restrict such unlawful acts, and the Court is not restricted to a prohibition of disturbances of the peace."

Statler v. Rachell, 83 Kan. 86:

This was an action holding that an injunction was properly granted to enjoin the maintenance of a cancer hospital, largely by reason of the fear of those residing near it, and their consequent disturbance rendered the same a nuisance.

The State v. Rabinowitz, 85 Kan. 841:

This was an action wherein the sale of intoxicating liquors in the streets and alleys of the city of Leavenworth was enjoined as a public nuisance, and in the opinion, on page 847, the Court said:

"A nuisance is public if it affects the community at large or if it affects a place where the public have a right to and do go, such as a park, street or alley, and which nuisance necessarily annoys, offends or injures those who come within the scope of the influence."

Commonwealth v. Cassidy, 6 Phila. 82:

This was an action charging the defendant with committing a public nuisance by falsely posting circulars warning the public that a desperate kidnapper was at large and about to visit the city. The Court, in holding that such actions were a public nuisance, said (Syl. 1):

"The publication of an advertisement calculated to alarm the public mind unnecessarily is a public nuisance and indictable as such."

Further on in the opinion, the Court said:

"To do any act which is calculated to spread terror and alarm through the community * * * renders the person so offending liable to indictment in common law. * * * That this publication, given to the public in the manner above stated, constitutes, in whatever light it might be viewed, a common nuisance, cannot, we think, be well questioned. That it is an injury to both the comfort and health of a large number of persons in the community * * * is self-evident, because its tendency is to fill the mind with anxiety, fear and alarm."

Hickerson v. The United States, Fed. Case No. 18301 (1856):

Town of Davis v. Davis, 21 S. E. 906 (W. Va.):

State v. Nease (Ore.), 80 Pac. 897:

From the above and the cases which will be cited under the next section it will be evident, we think, that an act which amounts to a breach or disturbance of the peace is a public nuisance. We will, therefore, pass to the question of the right of a court of equity to enjoin such acts, bearing in mind the objection that will be made to a court of equity enjoining a criminal act.

3. HAS A COURT OF EQUITY THE POWER TO ENJOIN AN ACT WHICH IS BOTH A PUBLIC NUISANCE AND A VIOLATION OF A CRIMINAL STATUTE?

The question of the power of the court of equity to enjoin a nuisance which is also a misdemeanor or violation of the criminal law is one that has been frequently discussed in this country. Our courts in Kansas have repeatedly and recently passed on the subject.

The State v. Rabinowitz, 85 Kan. 841:

"(Syl. 1.) At the common law acts done in violation of law, or which are against good morals, constitute public nuisances."

"(Syl. 3.) The fact that the same acts may constitute a public offense is no

bar in the maintenance of an equitable action to enjoin the nuisance."

The State, ex rel., v. Howat, 109 Kan. 376:

This case, decided in 1921, is probably the leading case on this subject in Kansas, and in an exhaustive opinion Judge Burch discusses the power of a court of equity to enjoin a threatened offense against the criminal laws. We will content ourselves with merely quoting from the syllabus this statement:

"3. The injunction order was not invalid as an attempt to enjoin the commission of crime."

The State, ex rel., v. Industrial Workers of the World, 113 Kan. 347:

The same objection was raised on behalf of the defendant in this case, and it was urged that a court of equity has no power to enforce a criminal statute by injunctive order. The Court in this case reaffirmed its stand taken in the Howat case, and held that the petition stated a cause of action as against the objection that a court of equity has no power to enforce a criminal statute by injunctive order.

State of Ohio, ex rel., v. Hobart, Ohio N. P. Rep. 246:

The opinion in the above case, which, unfortunately, is not reported in any other volume than the one cited, and is, therefore, not accessible to the bar in general, is one of the clearest and ablest opinions on this subject that we have been permitted to read. This was an action brought by the attorney general of the State of Ohio to enjoin a contemplated prize fight between Jeffries and Ruhlin. The opinion is so able that it should be quoted in full, but we will content ourselves with these few extracts from it:

"(Syl. 4.) All such affairs when held in public are common nuisances. They make a man's place of habitation less desirable to live in."

"(Syl. 5.) Such contests, with their attendant evils, affect a man's comfort and welfare. They may interrupt and prevent the common enjoyment of life and the peaceful pursuit of happiness, which are among every man's inalienable rights guaranteed him by the Constitution, and to secure which, with other things, governments are established among men."

"(Syl. 6.) A court of equity takes cognizance of these things, and when a threatened act, although a crime, is with its attendant circumstances also a public nuisance, will, when the apprehended injury is irreparable, and there is for it no adequate remedy at law, prevent its execution by injunction."

"(Syl. 7.) The state is interested in the enjoyment of life, the happiness, the health, the comfort, the safety, the morals and the well-being of its inhabitants, and its courts are open to it, on the relation of its attorney general, to prevent the infringement of these rights by any public nuisance. If the law is inadequate, or gives no remedy, the courts exercising equity jurisdiction will afford relief."

"(Syl. 8.) It is not essential that any property rights be involved in order that a court of equity may take cognizance of a public nuisance. The enjoyment of life, the happiness, the health, the comfort, the morals, the safety and the well-being of the inhabitants of a State are of more importance to them and to it than any property or mere money interests they or it can possibly have; and the right to these has at least the same constitutional guarantees that the right of property has."

"(Syl. 9.) Indirectly, property rights are involved in a public nuisance which lowers the moral tone of a community, gives it a bad reputation, and consequently makes it a less desirable place to live in. Property rights are directly

affected when the nuisance is of such a character that extra police must be employed to prevent breaches of the peace."

We believe it clear that should a riot occur as a result of a masked parade, in Kansas, the city in which the riot occurred would be liable in damages to any person injured therein (see Ch. 79, Laws of Kansas, 1923), and the damages assessed against the city would of necessity be paid by all the taxpayers, and each taxpayer, therefore, has a direct financial interest in the prevention of disorder, and has a direct property right in the maintenance of peace and the preservation of order. Further quoting from the opinion:

"Equity, even as administered by courts of equity, involves much of that which its name ordinarily implies. The jurisdiction of its courts had its foundation in natural justice and was developed from time to time to meet cases as they arose, when the law, through its rigid rules, worked injustice or afforded no remedy or was inadequate."

"The most efficient, humane and flexible remedy is that of injunction. Under this form the Court can prevent that from being done which done would cause a nuisance; it can command an observance of peace before it is broken; it can save suffering and sometimes disgrace to those who are in no way responsible; in some instances, and I believe this case presents one of them, it can secure an obedience to the laws of the country that a court of law, pursuing the other remedy, could not do."

It should be stated, with further reference to this case, that prize fighting was a felony in Ohio, and it was vigorously contended by the defendant that the State should wait until the prize fight took place, and then arrest the participants, charge them with felony and prosecute them on the law side of the court. From the few quotations given, however, it will be clear that the Court felt that that remedy was wholly inadequate.

State, ex rel., v. Canty, 207 Mo. 439; 15 L. R. A., n. s., 747:

This was an action brought by the attorney general of Missouri, seeking to enjoin certain parties from holding in St. Louis County a bull fight. The bull-fighting arena and bull fighting was held to be a public nuisance, and a perpetual injunction was granted. In the opinion, delivered by Justice Woodson, the Court said:

"(Syl. 2.) A bull-fighting arena may be abated, and bull fighting perpetually enjoined as a public nuisance, injurious to public safety and good morals, notwithstanding the fact that the offenders are punishable in criminal courts, or the fact that property rights of the complainants are not involved."

The Court, in approaching the question under consideration, summarized the questions presented in this way:

"First, is a bull fight, such as the one described by the evidence, a common or public nuisance within the meaning of the law.

"Second, if so, has a court of equity jurisdiction to interfere by injunction and prevent it or should the State be driven to the criminal law for redress?"

Page 755:

"The contention of respondents that a court of equity has no jurisdiction to abate a public nuisance where the offenders are amenable to the criminal laws of the State is not tenable." (Citing authorities.)

Page 756:

"A court of equity will not undertake to enforce the criminal law. Therefore, it will not enjoin the commission of a threatened act merely because the act would be a crime, but, on the other hand, neither will it withold its equitable relief in a case in which, for other reasons, it has jurisdiction, merely because the act, when committed, would be a crime."

"A man charged with the commission of a crime has a constitutional right to a trial by jury; but a man who has not yet acted, but who merely proposes to commit an act which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the constitutional right of trial by jury."

Our Kansas statute on this subject reads as follows:

"An injunction may be granted in the name of the State to enjoin and suppress the keeping and maintaining of a common nuisance."

Section 7163, Kansas Statutes, 1915.

"The function generally of the injunctive mandate is to afford protective relief and not redress for wrongs already committed. Its power is exercised not for the purpose of punishing a person for some wrongful act which he has committed, but rather to prevent the doing of such an act to the injury of another."

14 Ruling Case Law, Inj., sec. 7.

We will forbear quoting further law on this subject, as it is admirably briefed in the several cases referred to and in the following:

Ky. v. McGovern et al., 66 L. R. A. 2807.

In re Debbs, 158 U. S. 597.

United States v. Railway Employees (Dougherty strike injunction), 283 Fed. 479.

Having thus disposed of the main questions presented, we feel it proper and advisable to briefly touch on several minor questions that may arise in the mind of the Court or be suggested by counsel for the defendant.

4. HAS THE STATE AN ADEQUATE REMEDY AT LAW?

It may be said that if the act of parading in mask as set out in the petition is a disturbance of the peace, the State has an adequate remedy at law by reason of the criminal statute which we have previously cited. The State claims this remedy to be woefully inadequate. It may be suggested that the State should permit the parade to take place and then arrest and prosecute the paraders.

In order for that to be done, the sheriff must arrest without a warrant, for by reason of the concealment of identity a proper complaint cannot be sworn to either before, during or after the parade. Those the State might seek to arrest are masked and unknown. It is a significant fact that when the State sought to bring this action it could name but one of the several hundred individuals who might properly have been parties defendant.

In addition, such a course of action would require the arrest of many hundred men. Such a task is difficult and likely to lead to disorder. One sheriff in Texas who attempted to stop such a masked parade was seriously injured in the disorder that followed. It would further entail numerous prosecutions, and equity has always sought to avoid a multiplicity of lawsuits, either civil or criminal.

Further, it may be said that it is the contemplated injury to public safety, public welfare and public peace that the State seeks to protect. Once it is violated, no amount of criminal prosecutions can compensate the State or its people for the wrong done. The legal remedy, therefore, is wholly inadequate, and indeed may scarce be said to exist.

5. WHAT BEARING, IF ANY, HAS THE DEFENDANTS' MOTIVE IN PARADING IN MASK?

We have never been able to learn one logical reason for the masked parade. Such members of this organization as we have been privileged to talk to have said they paraded in public, "in order to impress the people with our strength."

The strength of any organization is not in the quantity of its members, but in the

quality thereof. That is even true of armies. Much more is it true of fraternal organizations. An organization acquires strength not through the clothing of its members, but through their character.

The mask is not needed for the advocacy of good principles. The logical effect and the purpose of the mask is to frighten and intimidate. It has always been the mark of the marauder and has never been used to cover honest men on an honest purpose bent. Its public use by this organization permits the criminal class to commit depredations in their name. It opens the way for the "wolf in sheep's clothing," if we may be pardoned for likening this awe-inspiring and mystic robe and mask to the fluffy covering of that placid, peaceful animal.

It may be said that their purpose in wearing this mask is lawful and commendable. To that we answer that the public does not so consider it and the history of the Knights of the Ku Klux Klan supports the public view. As to whether their purpose, or the purpose assigned by the so-called "alien" public, meaning all who are not citizens of the "Invisible Empire" and followers of the "Imperial Wizard," is to govern, we wish to cite these few authorities:

> "In determining whether or not a nuisance has been committed, the motive or intent with which the defendant did the act complained of will not be considered."
>
> Joyce, Nuisances, page 77.
>
> "It is not in this case so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious, but the question is, whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do serious injury."
>
> 87 Md. 352, quoted with approval in Statler v. Roschelle, 83 Kan. 86.
>
> Berchard v. Board of Health (Mich.), 4 A. L. R. 990.

We have discussed this question as fully as the limited space and time at our disposal would permit, for the reason that it is a question of vital importance to the welfare of the State and its people. While there are no cases directly in point, and while this is the first attempt to enjoin such a parade, we feel that there is abundant precedent for the action. This action is the only adequate relief that the State has, and courts of equity were created to afford relief under just such circumstances. Ours has been called a "government by injunction," due to the increasing use of the injunctive remedy. While the term has been applied in scorn, we feel that that appellation is not to our discredit. The injunctive remedy affords a simpler, cheaper, quicker and more adequate relief than any other. It provides an orderly means of disposing of a disputed point and obviates the commission of a criminal act and a resulting criminal prosecution. It has to recommend it even more good points and sound logic than the "declaratory judgment," provided for to settle civil disputes before the injury is occasioned or the damage done.

It may not be improper to call attention to the result of the decision in this matter. Should the injunction be granted it will merely deny to these defendants, and others, the right to parade in public in mask. Should the desire to parade in mask be irresistible, the defendants may gratify that desire and cater to that propensity within the confines of their "Klavern" or in any private place. The injunction will not in any measure interfere with their right to parade in mask in private, or with their right to parade in public unmasked. It will only take from them the privilege they claim of parading in masks in public, and that privilege they should not be permitted to assert in the interest of public safety, public welfare and in the preservation of the "peace and dignity of the State."

ANNOTATED CASE

INTERSTATE COMMERCE—EMPLOYEE WORKING ON RIGHT OF WAY

QUIRK v. ERIE R. CO.

139 N. E. 556

(Court of Appeals of N. Y., April 17, 1923)

A track laborer, in the yard of an interstate railroad, employed to cut grass and weeds growing near the track and to pick spikes and drawheads, which often dropped out of cars, his service being single and entire, is engaged in interstate commerce.

Proceedings under the Workmen's Compensation Law (Consol. Laws, c. 67) before the State Industrial Board, by Matthew Quirk, claimant, against the Erie Railroad Company, employer and self-insurer. From an order of the Appellate Division (203 App. Div. 347, 196 N. Y. Supp. 580) affirming by a divided court an award of the State Industrial Board, in favor of claimant, employer appeals. Reversed, and claim dismissed.

F. J. Meagher, of Binghamton, for appellant.

Carl Sherman, Atty. Gen. (E. C. Aiken, of Albany, of counsel), for respondent.

CARDOZO, J. The claimant was employed by the Erie Railroad Company, an interstate line, as a track laborer in the railroad yards at Deposit, N. Y. His duty, as described in his own testimony, was to clean up the yard. He cut the grass and weeds found growing near the tracks. He picked up spikes and drawheads, which often dropped out of the cars, as well as chunks of coal and ashes. The chief reason for removing grass and weeds was to make the grounds neat and attractive in appearance. Plass v. C. N. E. Ry. Co., 226 N. Y. 449, 123 N. E. 852. The chief reason for picking up "scrap" was to guard against derailment. This appears by the testimony of the claimant himself. A drawhead, he says, might cause a wreck. The like appears by the testimony of others—a superintendent and a foreman. There was danger, they tell us, not only in the presence of drawheads, but in accumulated coal and clinkers. Switchmen making up trains would stumble and fall. The protection of travelers and workmen was the prime consideration. So the employer's witnesses assert. There is nothing to the contrary.

The claimant, while thus working on a track, was hit by a rod projecting from a passing car. We think he was engaged in interstate commerce. There is no dispute that this would be true if at the moment of the accident he had been picking up a bolt or anything that would be a source of danger. The argument is, however, that he was brought within another orbit because the last thing that he did was to pluck some grass and weeds. We think this involves an undue subdivision of a service which in reality was single and entire. The claimant was employed generally to pick up growths and rubbish. At one moment he would be stooping to uproot an unsightly weed. At another he would be stooping to remove a perilous obstruction. His duty was a continuing one to be on the watch for things of danger. It was not broken and interrupted from one moment to another as this object or that came forward in the field of vision. His position in this respect is like that of a watchman in a signal tower, who is in interstate commerce whenever on the watch. Erie R. R. Co. v. Collins, 253 U S. 77, 40 Sup. Ct. 450, 64 L. Ed. 790; Erie R. R. Co. v. Szary, 253 U. S. 86, 40 Sup. Ct 454, 64 L. Ed. 794. It is like that of the laborer who removes snow from the tracks or from adjoining spaces for the protection of the roadbed. N. Y. Central R. R. v. Porter, 249 U. S. 168, 39 Sup. Ct. 188, 63 L. Ed. 536.

> "The service of a flagman concerns the safety of both commerces and to separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies." Philadelphia & Reading Ry. Co. v. DiDonato, 256 U. S. 327, 331, 41 Sup. Ct. 516, 518 (65 L. Ed. 955).

The order of the Appellate Division and the award of the State Industrial Board should be reversed, and the claim dismissed, with costs against the said Board in all courts.

HISCOCK, C. J., and HOGAN, POUND, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

NOTE—*Employee Removing Scrap from Interstate Tracks, and Cutting Grass On or Near Tracks, Engaged in Interstate Commerce.*—The Court of Appeals, as will be noticed, reversed the holding of the lower court in the same case. A note of the lower court's decision appears in 96 C. L. J. 58, where a portion of the court's opinion is quoted.

ITEMS OF PROFESSIONAL INTEREST

AMERICA AND THE LEAGUE OF NATIONS

Among the services which Lord Robert Cecil has rendered to the League of Nations and the cause of International Peace, not the least, perhaps, is his recent visit to America, and the account of it which he has given in his three articles in *The Times* of the 10th, 11th and 12th inst.

Objections to the League in America are, as is well known, based on the repugnance to being mixed up in European quarrels, and the possibility that Arts. X and XVI of the Covenant might have this effect.

Lord Robert was seriously asked at an interview whether it was not true that there were sixty wars going on in Europe at the present time, and while the "sixty" is a palpable exaggeration, there is enough in the condition of Europe, and, in particular in the French occupation of the Ruhr and the oppression of its people, to make outsiders pause before regarding the League as a success. But isolation for America is, as Lord Robert points out, impracticable, and this, he says, is recognized by almost every serious person in the United States. If, however, contact with Europe is necessary, America demands that there shall be no more war—a demand which, with an important section, requires the "outlawry of war." This, it may be anticipated, is what the future has in store, and with it must come the definite establishment of the Court of International Justice as the final arbiter of all disputes between nations, just as the courts of each country are the final arbiters there. In this view there is no room for any distinction between disputes which are justiciable or not; any more than there is room for any such distinction in disputes between individuals. If resort to force is barred, the decision of the court must prevail in all disputes. That is the lesson of the recent war, and is the only reasonable basis for international relations.

As to America's participation, Lord Robert Cecil says he came away as convinced as he was before he went that sooner or later the United States would join the League in some form or other. "In my view the League is a live organization, gradually increasing in power and authority. I cannot believe that anyone who has attended the three assemblies of the League will doubt this. The League is a far stronger body than it was three years ago."

We are glad Lord Robert feels justified in using this language.—Solicitors' Journal (Eng.), May 19, 1923.

CORRESPONDENCE

"FOUR TO FIVE DECISIONS"

October 8, 1923.

To the Editor of the Central Law Journal:

Members of Congress dissatisfied with the "Four to Five Decisions" of the Supreme Court have the power of preventing them placed in their own hands by the terms themselves of the third article of the Constitution of the United States.

The first section of that article establishes the Supreme Court using only the three words "one Supreme Court." It is silent as to its composition. Had the Congress so chosen, it could have provided that the Court consist of a single judge. Had they done this, there would be no divided opinions. The Congress, however, decided at first that the Court should consist of five judges and later of nine judges.

The Supreme Court of the United States as now constructed is the handiwork of the Congress of the United States, acting under said Article 3. The Congress could have gone farther under that article than they have done.

The second section of said Article 3 ordains that "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under *such regulations as the Congress shall make.*" The Congress, therefore, had a right to make a regulation that the appellate jurisdiction should be so exercised that no act of Congress, and that no act of the Legislature of a Sovereign State, could be declared unconstitutional except by a vote of more than a majority of the judges for the Supreme Court. That is, by a vote of at least two-thirds or three-fourths of the members of that Court. Certainly there is no necessity of demanding the adoption of an amendment to the said Article 3 as now written.

FREDERICK G. BROMBERG.

THE LAST STRAW

Mr. Busiman was exasperated with the telephone. Ten times that morning he had tried to get a number and each time something or other had prevented him from speaking. At last he got through.

"Hello!" he said. "Is Mr. X there?"

"Yes," replied a voice. "Do you want to speak to him?"

That was the last straw. Back went the reply in icy tones: "Oh, no! I merely rang him up to hand him a cigarette."—Telephone Record.

DIGEST.

Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Adverse Possessions**—Color of Title.—Color of title acquired after the initiation of adverse use does not relate back to the time of such adverse entry.—Wood River Power Co. v. Arkoosh, Idaho, 215 Pac. 975.

2. **Automobiles**—Agency.—Evidence showing that automobile driver had worked for defendant a few days, and that defendant gave bail and paid his fine after he ran into plaintiff, held insufficient to show he was driving the automobile in defendant's interest, in absence of sufficient evidence that defendant owned the automobile, or had authorized the driver to use it.—Lowe v. Antonelli, Mass., 139 N. E. 818.

3.——Agency.—The proof of ownership of an automobile and of the fact that the driver was a member of the owner's family merely makes out a prima facie case that it was being operated for the owner, and to avoid a finding to this effect there must be some showing to the contrary.—Rowland v. Spalti, Iowa, 194 N. W. 90.

4.——Contributory Negligence.—An automobile driver, going about 12 miles an hour, who discovered the train as it came into view when she was 40 feet from the intersection and immediately set the brakes, but moved forward because the car skidded over ice hidden by a thin coating of snow, held not guilty of contributory negligence.—Barrett v. United States Railroad Administration, Iowa, 194 N. W. 222.

5.——License.—Under ordinance of Birmingham requiring one desiring to operate motor bus for carriage of passengers to obtain license, to file application therefor, giving certain information, with the commissioner, who shall make investigation and report to the commission, which shall grant or refuse a license, but shall not grant one, if the maximum number of busses provided by the ordinance for the route desired has been licensed, till there is a vacancy, the granting of license and the number of busses that shall be licensed to one operator is discretionary, though the maximum number has not been reached.—Cloe v. State, Ala., 96 So. 704.

6.——Ordinary Care.—If an automobile driver, who struck a child on street in residence district, in the exercise of ordinary care could have seen the child in time to avert injury to him, it was negligence to fail to see him.—Fitzgerald v. Norman, Mo., 252 S. W. 43.

7. **Bailment**—Ownership.—Where an automobile truck which was delivered to a garage for repairs had attached to it documents issued by the motor vehicle department of the state, indicating that the person delivering it to them was the registered owner, and that plaintiffs who later demanded its surrender were the legal owners, held, under Motor Vehicle Act, §§ 1, 3, as amended by St. 1919, pp. 193, 196, §§ 1, 2, that the garage keeper was warranted in refusing to surrender to plaintiffs, and owed no duty to search out the registered owner to ascertain his rights.—Lambert v. Valentine, Calif., 215 Pac. 692:

8.——Place of Filing.—"The place where the debtor resides," within Crawford & Moses' Dig. § 6871, authorizing one voluntarily parting with possession of a motor vehicle on which he has a lien for repairs, to avail himself thereof by filing an itemized account with the clerk of the circuit court of "the county in which the debtor resides," means the home of his family, especially where he spends any part of his time with them, and not where he happens to be sojourning, though his business detains him in such locality most of the time.—L. O. Umsted Auto Co. v. Edwards, Ark., 251 S. W. 878.

9. **Bankruptcy**—Attorney's Fees.—Under the law of Texas, by which attorney's fees, when due under the terms of a contract, become a part of the contract debt, where notes of a bankrupt provided for attorney's fees in case the notes were placed in the hands of attorneys for collection, and they were so placed before the filing of the petition, the stipulated fees are allowable as part of the debt on the notes, though the attorneys took no action until after filing of the petition.—In re Griffen Drug Co., U. S. D. C., 289 Fed. 140.

10.——Partner's Claim.—Claim of one to property as partner of bankrupt, supported by judgment of a state court secured without fraud or collusion, held not colorable merely, so that it could be disposed of in a summary manner by the bankruptcy court.—In re Goetz, U. S. D. C., 289 Fed. 118.

11.——Partnership.—On the bankruptcy of a surviving partner, who has succeeded to the ownership of the partnership property, subject to payment of its debts, the executors of the deceased partner, whose estate is solvent, may intervene to assert his equity to have the partnership assets applied to the partnership debts.—In re Brewer, U. S. D. C., 289 Fed. 79.

12.——Removal of Trustee.—An order removing a trustee is one within the judicial discretion of the judge, and is reviewable only on a clear showing of abuse of discretion.—Woodford v. Cosden & Co., U. S. C. C. A., 289 Fed. 67.

13. **Banks and Banking**—Agency.—Where defendant bank agreed to open a credit for plaintiffs with a bank in Germany in 1916, but what it did do was to credit the account of the German bank and write to the German bank to open the credit under an arrangement between the banks, held, in view of the fact that defendant agreed to do one thing and did another, the fact that defendant bank adopted the right method was immaterial, and defendant was liable for nonperformance when the letters did not reach the German bank until 1919, when the German bank, under compulsion of the government, refused to open credit for plaintiff, but deposited the money in an account from which the payee was not allowed to withdraw it.—Landesberg v. Banker Trust Co., N. Y., 200 N. Y. S. 308.

14.——Exchange.—Federal Reserve Banks cannot be compelled to pay exchange charges nor abandon their superior facilities for handling and collecting checks, because their collection of checks causes country banks on which drawn to lose the profits made under the former methods of collecting checks.—American Bank & Trust Co. v. Federal Reserve Bank, U. S. S. C., 43 Sup. Ct. 649.

15.——Letter of Credit.—The ordinary commercial letter of credit contains authority to the beneficiary to draw a draft, and a promise to honor the draft, given either generally to bona fide holders or to some particular person, and if it shows it was for the purpose of being shown to obtain credit, and the purchaser is within the terms of the letter, it amounts to an offer that, if he purchases the draft, it will be honored, and the offer becomes a contract when the draft is negotiated.—Banco Nacional Ultramaraino v. First Nat. Bank, U. S. D. C., 289 Fed. 169.

16.——Preferences.—Sess. Laws 1915, c. 58, § 5, giving surety companies equal preference right with depositors in insolvent bank, held not violative of Const. art. 2, § 7, providing that no person shall be deprived of life, liberty, or property without due process of law.—State v. Johnson, Okla., 215 Pac. 945.

17.—Stoppage of Payment.—Where a bank, after being notified by a depositor of stoppage of payment, pays a check, it is liable.—Hewitt v. First Nat. Bank, Texas, 252 S. W. 161.

18. **Bills and Notes**—Consideration.—The payee of a note having failed to furnish the promised main or chief consideration therefor, even if such failure was due to the impossibility for any reason of furnishing the consideration, the maker was excused from paying the note.—Wallinger v. Kelly, Va., 117 S. E. 850.

19.——Holder For Value.—Under the common law, under G. L. c. 107, § 48, and under Sales Act, § 65, cl. 1, the taking of a negotiable promissory note before maturity as security for a pre-existing debt is a taking for value, and therefore a trust company, which received the note and assignment of mortgage securing it before maturity as additional security for a pre-existing debt of the payee of the note, was a holder for value.—Reynolds v. Park Trust Co., Mass., 139 N. E. 785.

20.——Payee.—Where, after the consolidation of two banks, a draft with bill of lading attached, discounted by the consolidated bank, was inadvertently made payable to one of its predecessors, held, that such draft might be construed as payable to bearer, under Code 1919, § 5571, relating to instruments payable to the order of fictitious or nonexistent person, or under Code 1919, § 5605, the bank would have a right to avoid the clerical error by indorsing it in the name to which it was payable, followed, if deemed fit, by its proper signature, so that in either event it was the legal holder of the draft and bill of lading.—First Wisconsin Nat. Bank v. People's Nat. Bank, Va., 118 S. E. 82.

21.——Signature.—Where one signs a note and affixes only such designation as president, secretary, or agent to his signature, the designation will be treated as descriptio personae and the party signing will be held liable.—Consumers' Twine & M. Co. v. Mt. Pleasant Thermo Tank Co., Iowa, 194 N. W. 290.

22. **Carriers of Passengers**—Discharge of Passengers.—It is the duty of carriers to stop trains for the discharge of passengers at the platforms provided therefor, and, if a passenger is carrried beyond a station and required to alight at an unusual place and in darkness, he should be warned of any danger and given such assistance or instructions as are reasonably necessary to secure his safe return to the platform, and egress therefrom in the usual way.—Payne v. Davis, Mo., 252 S. W. 57.

23.——Exhibit Tickets.—A carrier of passengers may adopt and enforce a rule requiring passengers to exhibit tickets or transportation before entering its trains. Such rules are reasonable and tend to benefit both the passenger and the carrier in preventing mistakes and disputes. The fact that a servant of the carrier insists on compliance with the rule, in a manner not insulting, does not afford an item or element of damage to a passenger, and where such a rule is adopted it is error to instruct the jury in a suit for damages that it was the duty of the carrier to admit the passenger on presenting himself if he had a ticket, when he refused to exhibit the ticket when requested to do so.—Illinois Cent. R. Co. v. Cox, Miss., 96 So. 685.

24.——Receiving Passengers.—When a carrier by electric interurban car manifested its purpose to receive passengers at a point where the car was stopped, its invitation was not limited to those who signaled the car to stop.—Mobile Light & R. Co. v. Ellis, Ala., 96 So. 773.

25. **Commerce**—Conservation.—That natural gas produced in West Virginia has become a necessity therein, and that the supply is waning and no longer sufficient to satisfy the needs of local consumers, if consumers in other states are also supplied, affords no ground for assumption by the state of power to regulate interstate commerce by compelling pipe line companies to prefer local consumers to interstate consumers, on the theory that it is a legitimate measure of conservation in the interest of the people of the state.—Commonwealth of Pennsylvania v. State of West Virginia, U. S. S. C., 43 Sup. Ct. 658.

26.——Tax.—Sales of oil made in Texas before the oil to fulfill the sales was sent to Texas, or the soliciting of orders for such sales, could not be taxed by the state, as any tax thereon is regulation of, and burden on, interstate commerce.—Sonneborn Bros. v. Keeling, U. S. S. C., 43 Sup. Ct. 643.

27. **Constitutional Law**—Congressional Enactment.—The courts have no power per se to review and annul acts of Congress on the ground that they are unconstitutional, but may only ascertain and declare the law when justification for some direct injury, suffered or threatened, presenting a justiciable issue, is made to rest on such an act, and have little more than the negative power to disregard an unconstitutional enactment standing in the way of enforcement of a legal right.—Commonwealth of Massachusetts v. Mellon, U. S. S. C., 43 Sup. Ct. 597.

28.——Permits.—Ordinance No. 742, § 5, City of Dallas, enacted under authority of the charter of the city of Dallas, art. 2, § 3, subd. 25, and providing that certain businesses, among them motion picture shows, shall not be maintained in residence districts of the city unless a permit has been obtained from the board of commissioners, and providing no standard required to be followed in determining whether such a permit should be granted, held to allow an arbitrary determination of that question upon the desires of adjacent property owners and to amount to a deprivation of property without due process of law, and invalid.—City of Dallas v. Urbish, Texas, 252 S. W. 258.

29. **Contracts**—Rescission.—A written contract may be changed by a later oral agreement, even though it provides that no change or modification may be made, except in writing signed by the parties.—Peck v. Stafford Flour Mills Co., U. S. C. C. A., 289 Fed. 43.

30. **Corporations** — Jurisdiction.—Agents of a foreign steampship company regularly keep on hand in this state a supply of first, second, and third-class steamship tickets, which entitle the purchasers to designated accommodations and carriage to be furnished by the company; they inquire of the company for space accommodations, before selling first and second-class tickets, but with this information and the prices once furnished, they make sales, deliver the tickets, and accept the purchase price; usually third-class tickets are sold and delivered and the price received without inquiry for space reservations. The tickets once sold and delivered, the company exercises no right to reject the passenger. Business so conducted, and as detailed in the opinion in this case, constitutes "doing business in this state," by such steamship company, within the meaning of our statutes, so as to give our courts, in the county where such agents transact such business and wherein they reside, jurisdiction in an action against the steamship company for personal injuries received by a passenger while on its lines.—Ruffner v. Cunard S. S. Co., W. Va., 118 S. E. 157.

31.——Stock Sales.—Where the agents for the sale of corporation stock made statements that they had intimate knowledge of the value of the stock, that it would, in the future, be worth more than the price charged and would pay certain dividends, and that if buyer should become dissatisfied the corporation would return his money, the falsity of which statements buyer could not know, buyer had the right to rely thereon; such statements not being mere matters of opinion.—Russell v. Industrial Transp. Co., Texas, 251 S. W. 1034.

32. **Covenants**—Restrictions.—One buying property with the understanding that it is restricted, and in reliance on existence of a general plan of improvement for the whole tract, does not have a right to enforce the restriction against another grantee who takes with full knowledge and notice of the restriction; the covenants being a part of each and every deed to lots in the tract, and the deed showing that a uniform plan must have been in existence.—McBride v. Freeman, Calif., 215 Pac. 678.

33.—Restrictions.—In the restriction in a deed to property prohibiting the erection of any buildings except dwelling houses and the necessary outbuildings, the words "dwelling houses" mean homes intended for human habitation, and the fact that two houses, each originally erected as a single family dwelling house on adjoining lots, were connected and used together as a single dwelling, by cutting a door through the partition between them, does not violate restriction.—Prest v. Ross, Mass., 139 N. E. 792.

34. **Escheat**—Bank Deposits.—Code Civ. Proc. Cal. § 1273, and Bank Act, § 15, providing for escheat to the state of deposits in bank, where no entries or withdrawals have been made for 20 years and the whereabouts of the depositors are unknown, at-

tempt to qualify agreements between national banks and their customers with respect to deposits which banks are authorized to receive, under Rev. St. § 5136 (Comp. St. § 9661), and are invalid.—First Nat. Bank of San Jose v. State of California, U. S. S. C., 43 Sup. Ct. 602.

35. **Explosives**—Oil Wells.—Though it is a custom among torpedo companies to shoot oil wells only at the owner's risk, such custom is no defense to a claim for damages resulting from the negligence of the company or its agent.—Southwestern Oil Development Co. v. Illinois Torpedo Co., Texas, 252 S. W. 334.

36. **Fish**—Polluted Water.—Within Ky. St. § 1253, making it an offense to put into any stream any liquid, berries, powder, medicine, or other thing whereby fish may be sickened or killed, or the water rendered unfit for use, the phrase "or other thing" was intended to include any substance which would have the prohibited effect, and was not limited to substances of the same class as those enumerated, and therefore a mining corporation, which polluted the waters of a stream by drainage from its mines, so as to kill the fish therein, was guilty.—Commonwealth v. Kenmont Coal Co., Ky., 251 S. W. 1018.

37. **Insurance**—Acceptance.—Under by-laws of benefit insurance society requiring suspended member to present certificate of good health, pay four monthly installments, and be accepted by majority vote, and requiring camp clerk to immediately forward three installments and the certficiate to sovereign clerk, and providing that upon receipt and acceptance thereof beneficiary certificate should be in full force, conditions precedent to reinstatement were not complied with where member was dead before sovereign clerk's receipt of the certificate, though he ackknowledged its receipt.—Sovereign Camp, W. O. W., v. Eastis, Ala., 96 So. 866.

38.——Burglar Insurance.—The contents of safe deposit boxes rented by a bank to others held not covered by burglary insurance policies containing a special agreement that insurer should not be liable for money and securities in connection with which no books and accounts were kept by insured, as the bank kept no books with respect to contents of such boxes.—First Nat. Bank v. Maryland Casualty Co., Md., 121 Atl. 379.

39.——Cause of Death.—In action on accident insurance policy evidence that insured was actively engaged in his vocation and apparently in perfect health immediately before injury to his eye, that immediately afterward a virulent infection set up therein and that a succession of ulcers followed for more than three months, during which time he became greatly reduced in flesh, increasingly nervous, and his face thin and drawn, until he died, justified a finding that the injury was the cause of death.—Wheeler v. Fidelity & Casualty Co., Mo., 251 S. W. 924.

40.——Change of Interest.—Under Pub. Acts 1917, No. 256, pt. 4, c. 2, where a bank was named in a loss payable clause as payee as its mortgage interest might appear, it having at the time a $50,000 mortgage interest, held that the later taking by the bank of another mortgage of $25,000 from the mortgagors, without notice to the insurer, was not a violation of the policy provision respecting change of interest.—Walz v. Peninsular Fire Ins. Co. of America, Mich., 194 N. W. 124.

41.——Cyclone.—By the terms of a policy of accident insurance, double indemnity was to be paid if the death of the insured was caused by a cyclone. An action to recover such indemnity was brought. In the instructions to the jury, the court defined a cyclone as: "A violent storm, often of vast extent, characterized by high winds rotating about a calm center of low atmospheric pressure. Popularly, . . . any violent and destructive windstorm." The definition was correct, and the evidence justified the jury in finding that the storm in which the insured lost his life was a cyclone.—Tupper v. Massachusetts Bonding & Ins. Co., Minn., 194 N. W. 99.

42.——Permanent Disability.—Tuberculosis is a permanent disease, within a policy insuring against "permanent disability" and providing that, if insured recovers from such a state of disability, no further payments will be made; "permanent" being applicable to a condition of disability, which, while not transient or ephemeral, still may pass away.—Ginell v. Prudential Ins. Co., N. Y., 200 N. Y. S. 261.

43.——Proof of Loss.—Where date of proof of loss and notice is not shown, it will be assumed that notice was given and proof made on date of fire, so that interest is to be computed from the sixtieth day after loss occurred, under policy provision that loss is payable 60 days after notice and proof of loss furnished the company.—Automobile Insurance Co. v. Buie, Texas, 252 S. W. 295.

44.——Public Policy.—The beneficiary under a policy insuring the life of his wife, whom he feloniously killed, cannot bring an action thereon in his own name, under G. L. c. 175, § 125, authorizing an action by the beneficiary, since it would be contrary to public policy to permit recovery under such circumstances.—Slocum v. Metropolitan Life Ins. Co., Mass., 139 N. E. 816.

45.——Representations.—Insured's representations in his application that he had never had spitting of blood, a symptom of tuberculosis, of which he died, or Spanish influenza, which tends to weaken the patient's resisting powers, held material to the risk and hence a ground for setting aside the policy.—George Washington Life Ins. Co. v. American C. Box Co., N. C., 117 S. E., 785.

46.——Voluntary Exposure.—Attempting to board a moving train held not, as a matter of law, an exposure to an obvious risk, within the meaning of those terms as used in an accident insurance policy precluding recovery if injuries resulted from "voluntary exposure to obvious risk."—Christensen v. National Travelers' Ben. Ass'n, Iowa, 194 N. W. 194.

47. **Licenses**—Steamship Agents.—License tax imposed under Act No. 233 of 1920, § 26, on private corporation acting as steamship agent, and serving United States government merely as one of its patrons, is not levied on government agency and does not interfere with powers vested in Congress contrary to Const. U. S. art. 6, cl. 2.—State v. Tampa Inter-Ocean S. S. Co., La., 96 So. 828.

48. **Livery Stable and Garage Keepers**—Servant In Charge.—On failure of a garage keeper to use ordinary care to employ a trustworthy servant, he would be responsible for damages arising from employing an untrustworthy servant to have charge of his garage.—Handley v. O'Gorman, R. I., 121 Atl. 399.

49. **Master and Servant**—Independent Acts.—Where a person is employed to operate an upright engine in a rural section, and which requires operation during hours after dark, who is furnished material from which a light may be made, and where the master does not undertake to furnish a light, and where the servant undertakes to furnish his own light for his work and is injured because of the inadequate light, he cannot recover from the master because the situation calls for the servant to make the necessary light, and he cannot recover for his own fault.—Hegwood v. J. J. Newman Lumber Co., Miss., 96 So. 695.

50. **Mines and Minerals**—Lease.—Where an executory oil and gas lease provided that if no well was commenced on the premises within 12 months it should be void unless the lessee paid a rental for each year that drilling was delayed, the nominal consideration of $1 for the lease and the inconsequential rental of 10 cents per acre per year were insufficient to prevent the grantor from effecting a nullification by giving the lessee written notice of intention to refuse further rentals and to require development of the property within a reasonable time.—Union Gas & Oil Co. v. Indian-Tex Petroleum Co., Ky., 251 S. W. 1008.

51. **Municipal Corporations**—Agency.—A municipality, with the right to establish and maintain crematories for the destruction of garbage, etc., and to haul or have hauled "trash and garbage of all kinds" thereto (Code 1907, § 1282), is not liable for its agents' or employees' torts in the exercise and performance of such "governmental functions"; they being designed primarily to promote the health and comfort of the general public.—City of Tuscaloosa v. Fitts, Ala., 96 So. 771.

52.——Due Care.—Evidence that defendant, while slowly backing from his garage against the sidewalk, looked to the side and to the rear of his car as far as possible, and that his wife, when he started to back, looked on the other side, held to raise a question for the jury whether he had exercised due care with respect to plaintiff, a small child, whom he injured.—Kropp v. Clem, Ala., 96 So. 865.